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IN THE

Supreme Court of the United States

October Term, 1964

No. 1065

W. C. HURTT, Trustee in Bankruptcy of the Estate of William G. Rider, Individually and trading as Rider Supply Company and as Rider Construction Company, Bankrupt,

vs.

NICHOLAS A. STIRONE,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

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No. .....

W. C. HURTT, Trustee in Bankruptcy of the Estate of William G. Rider, Individually and trading as Rider Supply Company and as Rider Construction Company, Bankrupt,

vs.

NICHOLAS A. STIRONE,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

Petitioner, Nicholas A. Stirone, prays that a Writ of Certiorari be granted to review the Judgment of the Supreme Court of Pennsylvania, Western District, affirming the Judgment of the Court of Common Pleas of Allegheny County, Pennsylvania, wherein conclusive effect was given to Petitioner's prior criminal conviction and verdict directed in favor of Plaintiff.

Opinions Below

The Opinion of the Supreme Court of Pennsylvania and the Dissenting Opinions of Justices Cohen and Musmanno, copies of which are annexed hereto as Appendix A, the same having been reported only in the advanced publica-

tions of the Atlantic Reporter at 206 A. 2d 624 and not in any volume of the official reports.

The Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, which is contained in the printed Record for the use of the Court below. A certified copy of said Record accompanies this Petition and nine (9) extra copies are filed herewith. The said Opinion of the Court of first instance is at page 269 *et seq.* thereof.

Basis of Jurisdiction

The Judgment of which review is sought is that of the Supreme Court of Pennsylvania which was filed January 14, 1965 and the Order of the Supreme Court of Pennsylvania denying reargument and filed February 16, 1965. The said Order does not appear to have been included in the Certified Record though requested in Petitioner's Notice of Petition for Writ of Certiorari (See page 307 of Certified Record). However, letter of the Deputy Prothonotary of the Supreme Court of Pennsylvania, dated February 19, 1965 quotes said Order and a copy thereof is annexed hereto as part of Appendix A.

The jurisdiction of your Honorable Court is invoked pursuant to the provisions of the United States Code, Title 28, Section 1257 (3) and Supreme Court Rule 19, paragraph 1 (a) for the reason that the Supreme Court of Pennsylvania and the Court of Common Pleas have deprived Petitioner of his right to trial by jury, as guaranteed by the Seventh Amendment to the United States Constitution and Article 1, Section 6 of the Pennsylvania Constitution. Further, the said Courts have deprived Petitioner of his property without due process of law in violation of the guarantees of the Fourteenth Amendment to the United States Constitution. The Trial Judge gave

conclusive effect to Petitioner's prior criminal conviction and directed a verdict for Plaintiff. This action was sanctioned by the Supreme Court of Pennsylvania.

A federal question of substance is presented which heretofore has not been determined by your Honorable Court and the decision of the Court below is probably not in accord with applicable analogous decisions of your Honorable Court.

Questions Presented for Review

I. Was not Petitioner deprived of his right to a trial by jury when the Trial Judge gave conclusive effect to his record of prior criminal conviction and directed a verdict for Plaintiff?

II. Was not Petitioner deprived of his property without due process of law when the Trial Judge treated Petitioner's record of prior criminal conviction as conclusive evidence of Petitioner's liability?

Provisions of Law Involved

The provisions of the Constitutions of the United States and Pennsylvania which are involved in this case are set forth in Appendix B hereto in the following order: United States Constitution, Amendment VII; United States Constitution, Amendment XIV, Section 1; Pennsylvania Constitution, Article 1, Section 6.

Statement of the Case

The action, in which the matter in question occurred, was brought by the Trustee in bankruptcy in 1957 as an action in assumpsit in the Trial Court, seeking to recover certain monies from Petitioner. The Trustee alleged that said monies were paid to Petitioner by William G. Rider

as a result of threats by Petitioner that he would cause Rider to lose a certain contract which he had allegedly obtained with Ragnar Benson, Inc. to supply concrete for the construction of a steel mill for Pittsburgh Steel Company in 1951 (Certified Record pages 4-9, 66, 67).

Petitioner, in answer to these allegations, set forth that he had actually interceded with Ragnar Benson, Inc., at the request of Robert O. Dierker, President of Duquesne Slag Company, to obtain the contract for Rider and that, for this service, Rider agreed to pay Petitioner a commission of fifty (50) cents per cubic yard of concrete supplied (Certified Record pages 10-12). The allegations of Petitioner were fully substantiated, at trial, by Robert O. Dierker and Jacob G. Kassab, the Vice President of Ragnar Benson, Inc. (Certified Record pages 119-124, 132-136, 168-176). The meeting between Mr. Rider, Mr. Dierker and Petitioner at the office of Duquesne Slag Company was also corroborated by Catherine Perry (Certified Record pages 156, 157). The commissions were paid to Petitioner by check, at his insistance, and Petitioner made return and paid income tax thereon (Certified Record pages 235, 240).

In 1955, Rider was placed in bankruptcy by petition of certain of his creditors, one of which was Duquesne Slag Company (Certified Record pages 26, 96). During the proceedings had therein, the records of Rider were available to various departments and bureaus of the United States government and it ultimately appeared, from the records of that proceeding, that the United States of America had substantial claims against Rider.

In 1956, Petitioner was indicted and was tried in the United States District Court for the Western District of Pennsylvania at Criminal No. 14871. The indictment charged that Petitioner had violated Section 1951, Title 18,

United States Code. After two trials and numerous appeals, which consumed more than five years, the Petitioner was convicted and sentenced to ten years imprisonment and a fine of $10,000.00. Proceedings have been instituted on behalf of Petitioner, by his present counsel, in the nature of Motion to Vacate Sentence which is presently before your Honorable Court at No. 982, October Term 1964 on Petition for Writ of Certiorari, and in the nature of Petition for Writ of *Habeas Corpus* which is presently before the United States Court of Appeals for the Seventh Circuit at No. 14846. Petitioner was, at the time of trial in the instant case, and presently is imprisoned at the Federal Penitentiary at Terre Haute, Indiana and was brought to Pittsburgh by and was in the custody of a United States Marshal during the trial before the Honorable Arthur Wessel, Jr. and a jury.

During the trial, in this case, Judge Wessel permitted counsel for the Trustee to introduce into evidence a certified copy of Petitioner's Indictment and Conviction, "not as exclusive proof of this so-called duress, but as some evidence tending toward that" (Certified Record pages 107-112). Later in the trial, Judge Wessel also admitted the same exhibit for purpose of impeaching the credibility of Petitioner (Certified Record page 251). Finally, as reflected only by the Charge of the Court, Judge Wessel characterized the previously admitted record as "conclusive evidence of extortion of this money from Rider" and required the jury to return a verdict "for the Plaintiff and against the Defendant in the sum of not less that $31,274.13, together with interest on that amount from January 1, 1954, to date, at a rate not to exceed six per cent" (Certified Record page 258). The jury returned a verdict for Plaintiff in the amount of $31,274.13, as directed by the Trial Court plus 3% interest (total interest not to exceed

$7,505.79) for a total verdict of $38,779.92 (Certified Record page 264).

After Motion for New Trial, made by Petitioner's trial counsel, and adverse decision thereon by the Trial Court, present counsel perfected an appeal to the Supreme Court of Pennsylvania at No. 219 March Term, 1964, which Court affirmed the Trial Court in Opinion filed January 14, 1965 (Certified Record pages 291-297 and Appendix A of this Petition). Justices Cohen and Musmanno filed separate dissenting opinions (Certified Record pages 298-302 and Appendix A of this Petition). The Petition for Reargument was denied by the Court below on February 16, 1965 (Certified Record pages 303-306 and Appendix A of this Petition).

The violation of Petitioner's rights guaranteed by the Constitutions of the United States and Pennsylvania first occurred during the trial by the offer and admission into evidence of the Record of prior criminal conviction as proof of duress and was excepted to by Petitioner's trial counsel (Certified Record pages 107-113). The second occasion arose upon the offer and admission into evidence of the same exhibit to impeach Petitioner's credibility and was excepted to by Petitioner's trial counsel (Certified Record pages 251, 252). Finally, after refusing the point of counsel for the Trustee for binding instructions and after several discussions off the record and at side bar, the Trial Court, in its charge to the jury, gave conclusive effect to the Record of criminal conviction and directed the jury to return a verdict for Plaintiff (Certified Record pages 253-260) and Petitioner's trial counsel excepted thereto (Certified Record pages 253, 254, 256, 261). The matter was again placed before the Trial Court by trial counsel as points 1 and 5 of the Motion for New Trial (Certified Record pages 265, 266). The error and effect of

the Trial Court in giving conclusive weight to the Record of criminal conviction was again raised in the Supreme Court of Pennsylvania in argument and in the Petition for Reargument (Certified Record pages 303-306). The decisions of both the Trial Court and the Supreme Court of Pennsylvania dismissed these objections, apparently on the basis that Petitioner had had his day in court and to treat the Record of criminal conviction other than as conclusive would tend to destroy the confidence of the public in the operation of the courts and would stir up litigation (Certified Record pages 283, 284, 296, 297 and Appendix A to this Petition).

ARGUMENTS AND REASONS WHY THE WRIT SHOULD BE GRANTED

POINT I

Petitioner was deprived of his right to trial by jury when the Trial Judge gave conclusive effect to his record of prior criminal conviction and directed verdict for Plaintiff.

At the outset, it is understood that the Seventh Amendment of the United States Constitution does not apply to jury trials in state courts. However, in the instant case, the Trial Judge, in fact, substituted the determination of a federal jury in the criminal trial of Petitioner for the determination of the jury in the instant case pertaining to the civil proceeding. On this basis, it is the contention of Petitioner that a federal question exists.

Upon the trial of this case, an almost singular and totally determinative issue of fact existed; to wit, did Petitioner exact money from Mr. Rider under duress or did Petitioner collect an agreed commission from Mr. Rider for interceding with Mr. Kassab, Vice President of Ragnar Benson, Inc., thereby obtaining a desired contract for Mr.

Rider? The proofs and testimony offered on this issue of fact, not the least of which was the testimony of Mr. Kassab, overwhelmingly supported the contention of Petitioner. However, the jury was never permitted to consider that evidence or determine the fact.

The Constitution of the United States mandatorily requires that the right to trial by jury shall be preserved in suits at common law where the amount in controversy exceeds twenty dollars. That the amount in controversy in the instant case exceeds more than one thousand times twenty dollars cannot be doubted. That the instant case is a suit at common law is established by the historical jurisprudence of the Commonwealth of Pennsylvania which is one of very few remaining common law states. This was, simply, a suit brought on contract comprised in the implied promise to pay money alleged to be unjustly held.

Article 1, Section 6 of the Pennsylvania Constitution provides that "Trial by jury shall be as heretofore, and the right thereof remain inviolate." What had constituted trial by jury "heretofore" is clearly set forth in *Wynkoop v. Cooch* (1879), 89 Pa. Supreme Ct. 450. It is there stated by Mr. Chief Justice Sharswood, speaking for the Court, at page 451:

> "The object of this provision (Pennsylvania Constitution, Article 1, Section 6) was to preserve the jury as a tribunal for the decision of all questions of law and fact in criminal trials; and of all questions of fact in civil causes. Such it had been theretofore; and it was ordained by the people that such it should continue to be thereafter inviolate."

So also, in *Smith vs. Times Pubishing Co.* (1896), 178 Pa. Supreme Ct. 481, 36 Atlantic Reports 296, it is stated at page 498:

> "The provision of the constitution is that 'trial by jury shall be as heretofore, and the right thereof re-

> main inviolate.' The same or very similar language is contained in the constitution of nearly every state, and the uniform construction by judges and text writers has been that the phrase 'shall be as heretofore' refers to the method of trial itself and means that it shall be preserved with its substantial elements, while the second phrase, 'the right thereof shall remain inviolate' refers to the right to a jury trial before the *final* decision in all cases where it would have existed at the time of the adoption of the constitution."

In the case of *Wellitz vs. Thomas* (1936), 122 Pa. Superior Ct. 438, 185 Atlantic Reports 864, it is stated at page 440:

> "By the sixth section of the Declaration of Rights, it is provided that 'trial by jury shall be as heretofore, and the right thereof remain inviolate'; and its meaning is that a jury shall continue to be the tribunal for the determination of all questions of fact in controversies between individuals and in actions and prosecutions brought by the Commonwealth, its substantial feature being that the jury shall consist of twelve good and lawful men, whose verdict must be unanimous: Wynkoop v. Cooch, 89 Pa. 450; Smith v. Times Publishing Co., 178 Pa. 481, 36 A. 296; Com. v. Collins, 268 Pa. 295, 110 A. 738."

That the Seventh Amendment to the Constitution of the United States has an identical meaning is established in *Ex Parte Peterson*, 253 U. S. 300, 309, 310; 40 S. Ct. 543, 546; 64 L. Ed. 919. It is there stated by Mr. Justice Brandeis, speaking for the Court:

> "Fourth: The command of the Seventh Amendment that 'the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained. Walker v. New Mexico & Southern Pacific R. R. Co., 165 U. S. 593, 596. Compare Twining v. New Jersey, 211 U. S. 78, 101. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these

> may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice.[1] Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with."

The Trial Court, in the instant case, deprived Petitioner of his right to trial by jury as effectively as though there had never been a jury selected or no evidence adduced for its consideration. The singular, determinative issue of fact was dogmatically taken away from the jury and the body of the jury became a pure mechanical apparatus for the sole purpose of recording, on a verdict slip, that which the Trial Judge had directed it to do.

The Court below and the Trial Court relied most heavily upon the cases of *Mineo vs. Eureka Security Fire & Marine Insurance Company*, 182 Pa. Superior Ct. 75; 125 Atlantic Reports, 2d Series 612 (1956) and *Pennsylvania Turnpike Commission vs. United States Fidelity and Guaranty Company and James F. Torrance*, 412 Pa. Supreme Ct. 222; 194 Atlantic Reports, 2d Series 423 (1963). That these cases are distinguishable on the facts and were decided within the narrow limits of their facts is clear from the decisions. It is unimportant to this consideration whether or not those decisions are wrong.

In the Mineo Case, *supra*, the plaintiff was the assignee of wrongdoers who had been convicted of arson on the very risk for which the assignee brought suit on the insurance contract. The Court merely held that the assignee stood in the position of the wrongdoers, *was seeking the aid*

"[1] See 'Trial by Jury and The Reform of Civil Procedure,' by Prof. A. W. Scott, 31 Harvard Law Review, 669."

of the Court and it would not afford same. In the instant case the Petitioner never sought the aid of the Trial Court. It was no possible aid or benefit to him to be taken, in custody, from prison, brought half way across the country to suffer further insults before the public and in the press from the very person whom he had been requested to and had sought to assist, and who, through his own incompetence, ineptness and business turpitude, brought himself to a position before the United States Government where he found it expedient and self-saving to blame Petitioner for his shortcomings, failures and evasions.

In the Pennsylvania Turnpike Commission Case, *supra, plaintiff had pleaded the conviction of Torrance in the complaint. The answer did not deny the fact of the conviction. A fortiori, it became an admission under the rules of pleading.* Plaintiff then moved for judgment on the pleadings which was denied by the lower Court. Upon appeal, the Supreme Court of Pennsylvania uttered a great deal of *dicta* regarding public policy but, nonetheless, sent the case back to the lower Court for trial on certain factual issues. The portion of that case which we relied upon is authority for nothing, since it was not decisive and need not have been said. It is important to note, however, that the Supreme Court of Pennsylvania in that case was very careful to limit its discussion to the particular circumstances involved. In the instant case, the conviction of Petitioner was not pleaded and never became a conclusive determination of liability until the Trial Court, over objection, made it so by usurping the historical and unrelinquished function of the jury.

It is interesting to note that the instant case was filed more than six years prior to trial. Present counsel for Petitioner is not aware what occasioned this untoward

delay but it is quite clear that, if the action of the Trial Judge, in taking the very crux of the factual determination away from the jury, is allowed to stand, the Petitioner has been seriously prejudiced by this delay. At the time this action should have come to trial, in the usual course, there was no conviction of Petitioner.

Clearly, Plaintiff was permitted to offer as substantive proof, which was treated as conclusive fact by the Trial Judge, matter which was not pleaded and which Petitioner had neither opportunity to answer nor defend against. In fact, the Trial Judge has given Petitioner's record of indictment and conviction exactly the same effect as an admission, whereas, it is extremely doubtful whether such matter can be properly pleaded.

What would the Plaintiff and the Trial Court have done if this case had come on for trial, in the ordinary course, at a time when there was no conviction? It is clear, from the decisions, that the arrest and indictment could not have been shown for any purpose. What, then, occurred to open the door to Plaintiff and to permit the Trial Judge to treat the matter in this manner? Another Court has adjudicated a criminal case between different parties and before a different jury. This has never been treated as *res judicata* of the facts in issue in subsequent civil proceeding in any case where that matter was in issue.

In all of these areas the action of the Trial Court and the Court below has deprived Petitioner of his property without due process of law as well as depriving him of his right to trial by jury.

POINT II

Petitioner was deprived of his property without due process of law when the Trial Judge treated Petitioner's record of prior criminal conviction as conclusive evidence of Petitioner's liability.

All of the Arguments and Reasons presented in Point I are also pertinent herein and it is repectfully requested that they be considered with relation to Point II.

The Fourteenth Amendment to the United States Constitution states that no state shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Every trial lawyer knows, as does every Court engaged in the trial of both civil and criminal cases, that the defense counsel in the trial of a criminal case employs entirely different procedures from a civil case trial, and either limits or extends the scope of interrogation and, in fact, the use of witnesses according to certain basic and well established rights. It is quite conceivable and, actually, usual that the criminal defense lawyer will offer far less evidence than will the civil trial lawyer on identical issues.

This of course, stems from the aforesaid basic and well established rights, many of which are provided by the Constitutions of the United States and Pennsylvania. Certainly, if the construction of the Mineo and Pennsylvania Turnpike Commission Cases, *supra*, which were successfully urged upon the Trial Court and the Court below becomes the law, these basic rights will have been effectively, though perhaps circuitously, abrogated. In effect, it will amount to stating to an accused in a criminal case, "You need not testify or even offer any evidence in your behalf under

the protection of your constitutional privileges and statutory guarantees but, if you don't and you are convicted, that conviction will be held to be *res judicata* in any subsequent civil proceeding by or against you arising out of this issue." This is not due process of law.

It must also be noted, as set forth in the Statement of the Case, that there are presently proceedings before your Honorable Court and the Court of Appeals for the Seventh Circuit pertaining to the conviction of Petitioner. When is a criminal defendant "constitutionally guilty" and what will be the status of the decision in the instant case if Petitioner is declared not to be guilty? There were very basic reasons for not confusing criminal and civil matters and they should be preserved.

Interestingly, the Court below has seen fit to draw an ill-defined distinction between crimes (Certified Record pages 296, 297 and Appendix A of this Petition). It states, in effect, that this newly conjured doctrine will not be applicable to minor crimes. This is not equal protection of the laws.

As mentioned in the same passage, at the above cited pages, it is *indeed* interesting to compare the effect of a plea of *nolo contendere*, as in the case of *Teslovich vs. Firemen's Fund Fire Insurance Co.*, 110 Pa. Superior Ct. 245; 168 Atlantic Reports 354 (1933). In that case the Court gave it no effect in the civil proceeding and the crime involved was arson, a crime which, at common law, ranked directly along side of murder.

Conclusion and Summary

Petitioner has been denied his right to trial by jury. Petitioner has been deprived of his property without due

process of law. Petitioner has not been afforded the equal protection of the laws. Such administration of basic constitutional rights and guarantees must not be permitted to stand as the decided law of a land where constitutional guarantees have so long been jealously protected.

Lest it be contended that the questions here were not brought to the attention of the Court below with sufficient specificity in all particulars, the language and reasoning of Mr. Justice Shiras in the case of *Green Bay etc. Canal Co. vs. Patten Paper Co.*, 172 U. S. 58, 19 S. Ct. 97, 43 L. Ed. 364, is pertinent. It is there stated, at page 67:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted."

Respectfully submitted,

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APPENDIX A

Opinion of Supreme Court of Pennsylvania

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 219 and 225 March Term, 1964

W. C. HURTT, Trustee in Bankruptcy of the Estate of William G. Rider, Individually and trading as RIDER SUPPLY COMPANY and as RIDER CONSTRUCTION COMPANY, Bankrupt,

v.

NICHOLAS A. STIRONE,

Appellant.

SAME,

Appellant,

v.

SAME.

Appeals from the Judgment of the Court of Common Pleas for the County of Allegheny at No. 3290 October Term, 1957.

No. 219: Entered, April 20, 1964.
No. 225: Entered, April 28, 1964.

Opinion Filed January 14, 1965.

EAGEN, J.

This case presents two appeals from a judgment entered in the Court of Common Pleas of Allegheny County.

The factual background is as follows:

The plaintiff, Trustee in Bankruptcy of the Estate of William G. Rider, individually and trading as Rider Supply Company and Rider Construction Company, bankrupt, brought this action in assumpsit in his capacity as trustee to recover a sum of money paid by Rider to the defendant as the result of extortionate threats.

Rider was engaged in construction work, and also in the business of supplying building materials to general contractors in western Pennsylvania. He became involved with the defendant, a "labor leader" in the same area, during the course of negotiations for the award of a sub-contract to supply ready-mix concrete to a construction company, Ragnar Benson, Inc. (Ragnar), for incorporation into a steel mill to be built by that company. Rider was awarded this subcontract on a bid of $11.75 per cubic yard of concrete delivered, and, pursuant thereto and to subsequent additions delivered in excess of 60,000 cubic yards of concrete. Rider then paid $31,274.13 to the defendant, calculated on the basis of $.50 per cubic yard of concrete which Rider had delivered to Ragnar.

It is the recovery of this money that forms the basis of this action. Plaintiff's evidence established that the money was paid to the defendant by Rider as the result of extortionate threats made by the defendant, to the effect that unless Rider complied, the defendant, by virtue of his position as labor leader, would cause Rider to lose the subcontract with Ragnar, and other business which the defendant could influence. Defendant admitted receiving the money, but denied making the alleged threats and asserted that the payments were consideration for efforts on his part to secure the Ragnar contract for Rider.

At the conclusion of the testimony, the trial court *directed* the jury to return a verdict in favor of the plaintiff in the sum of $31,274.13, plus interest not to exceed 6% from January 1, 1954. The jury returned a verdict in the total sum of $38,779.92 ($31,274.13 plus interest not to exceed $7505.79), which included the principal sum plus interest at the rate of 3%.

The defendant filed a motion for a new trial based upon alleged trial errors. The plaintiff filed a motion to mould the verdict, contending that, under the circumstances, he was entitled to recover interest at the rate of 6%. Both motions were dismissed by the court *en banc*, and from the judgment entered upon the verdict, both parties appealed.

DEFENDANT'S APPEAL (NO. 219)

As a result of the money payments involved herein, the defendant was twice tried and convicted in the United States District Court for the Western District of Pennsylvania for violation of the Hobbs Anti-Racketeering Act, 18 U. S. C. § 1951: *United States v. Stirone*, 168 F. Supp. 490 (W. D. Pa. 1957), aff'd 262 F. 2d 571 (3d Cir. 1958), rev'd 361 U. S. 212 (1960); and, *United States v. Stirone*, 311 F. 2d 277 (3d Cir. 1962), cert. denied 372 U. S. 935 (1963). At the trial on the criminal indictment, similar factual issues were involved and the defendant's testimony was the same as given in the trial of the present action.

At the instant trial, the record of the defendant's conviction was admitted in evidence, over objection, as *some evidence* of duress to secure the payments involved, and also to impeach defendant's credibility. However, in charging the jury, the trial court ruled, on the basis of *Pennsylvania Turnpike Comm. v. United States Fidelity & Guaranty Co.*, 412 Pa. 222, 194 A. 2d 423 (1963), that the record

of the criminal conviction was conclusive evidence of the fact of the alleged extortion and, therefore, the plaintiff was entitled to a directed verdict for the recovery of the sums so paid. It is this ruling that is primarily questioned here.

The question for determination, therefore, may be stated in this manner: In a civil suit against a convicted extortioner to recover the extorted money, is proof of the conviction of the extortion conclusive evidence of the fact of extortion?

Research discloses that decisions in other jurisdictions reflect a marked disparity in result. See, 18 A. L. R. 2d 1287. The majority of jurisdictions exclude the record of the criminal conviction and rule that it has no probative value for any purpose. See, 50 C. J. S. Judgments, § 754 (b). However, the rationale is based more in history and technicality than in logic. Moreover, there is a growing tendency to decide each case upon its particular facts, with a view toward applying the exclusionary rule only where reason and logic so demand. See, *Eagle, Star & British Dominions Ins. Co. v. Heller*, 149 Va. 82, 140 S. E. 314 (1927), for a well reasoned discussion. See also, *Schindler v. Royal Ins. Co.*, 258 N. Y. 310, 179 N. E. 711 (1932); *Local 167, I. B. of Teamsters v. United States*, 291 U. S. 293 (1934); and, *Developments in the Law-Res Judicata*, 65 Harv. L. Rev. 818 (1952).

In Pennsylvania, judgments in criminal cases for years were held inadmissible to establish the facts in a civil case. See, *Estate of Edward D. Gartner*, 94 Pa. Superior Ct. 45 (1928), and *Commonwealth v. Moran*, 251 Pa. 477, 96 A. 1089 (1915). But the tendency of recent decisions is away from enforcing a rigid rule. See, *Mineo v. Eureka Security Fire & Marine Ins. Co.*, 182 Pa. Superior Ct. 75, 125 A.

2d 612 (1956), and *Griefer's Estate*, 333 Pa. 278, 5 A. 2d 118 (1939).

Very recently this Court unanimously held[1] in *Pennsylvania Turnpike Comm. v. United States Fidelity & Guaranty Co., supra,* that a public servant and his surety bondsman were conclusively bound as to the fact of guilt, established by the record of the individual's prior criminal conviction for criminal misbehavior in office introduced in a civil action, involving the same facts and issues. The parallels of the present case to that case are striking. In each case, the record of conviction of the *defendant* was offered by the plaintiff, in the civil action, to bar the defendant from avoiding restitution, as opposed to the record of conviction of the plaintiff, as was the situation in *Mineo, supra.* So too, in each case the defendant was seeking to avoid payment of a sum of money to the plaintiff by asserting non-liability on the basis of the facts already established to the contrary in prior criminal proceedings.

In *Mineo*, at page 86, the Court said, "We are of the opinion that when one is convicted of a felony and subsequently attempts to benefit from the commission, the record of his guilt should be a bar to his recovery." We are equally of the opinion that when one has been convicted of a felony, the result of which is of financial benefit to him, the record of his guilt should bar his avoidance of restitution therefor. This was implicit in the ruling of the *Pennsylvania Turnpike Commission* case, *supra*, and we now directly so hold. In *Mineo*, the basic fact in issue was whether or not the plaintiff's assignor had started the fire; in the *Pennsylvania Turnpike Commission* case, it was whether or not Torrance had violated the trust of his office;

[1] Mr. Justice Cohen did not participate in the consideration or decision of the case.

here, it is whether or not the defendant extorted money from Rider. The parallel is persuasive.

The same principles of public policy enunciated in *Mineo, supra,* and *Pennsylvania Turnpike Commission, supra,* apply with equal force to the present case. The defendant was presented with more than ample opportunity to overcome the charges lodged against him while he was swathed in a cloak of presumed innocence. His case was twice presented to a federal jury which found him guilty of extortion beyond a reasonable doubt, upon the same facts which are now urged as the basis for his civil liability. To now hold that the effect of those jury determinations is *nil* not only would be to fly in the face of reason, but also would be a general indictment of the whole American jury system. We are not now prepared to say that the mere technical effect of the doctrines of *res judicata* and collateral estoppel regarding identity of parties is sufficient to overcome the policy which requires us to give conclusive effect to the prior conviction herein. The defendant should not now be heard to deny that which was established by his prior criminal conviction, without proof that his conviction was procured by fraud, perjury or some manner of error now sufficient to upset the conviction itself. Defendant has had his day in court and has failed to instill even a reasonable doubt in the collective mind of his then jury. No valid reason exists why he should be given a chance to try his luck with another jury.

In so deciding, we recognize a valid existing distinction in cases involving the record of conviction of relatively minor matters such as traffic violations, lesser misdemeanors, and matters of like import. Especially in traffic violations, expediency and convenience, rather than guilt, often control the defendant's "trial technique." In such cases, it

is not obvious that the defendant has taken advantage of his day in court, and it would be unreasonable and unrealistic to say he waived that right as to a matter (civil liability), which was probably not within contemplation at the time of the conviction. Compare also the effect given in Pennsylvania to a plea of *nolo contendere: Teslovich v. Firemen's Fire Ins. Co.,* 110 Pa. Superior Ct. 245, 168 A. 354 (1933).

The policy shifts with regard to major criminal convictions such as the one presented. We find it incredible in such a situation that a defendant would present less than his best defense, knowing that his failure would result in the loss of substantial property, or even his liberty.[2]

PLAINTIFF'S APPEAL (NO. 225)

As above noted, the jury returned a verdict in favor of the plaintiff for the principle sum, plus interest at the rate of 3%. Plaintiff contends that, since the amount of money involved was not in dispute, he is entitled as a matter of law to receive interest at the legal rate of 6%, and that the lower court erred in not moulding the verdict to include this sum.

After careful consideration of the pertinent case law, this court is equally divided on this question. Hence, the determination of this issue by the lower court must stand.

Judgment affirmed.

Mr. Justice Musmanno filed a dissenting opinion.

Mr. Justice Cohen filed a dissenting opinion.

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[2] On October 16, 1961, Nicholas A. Stirone, defendant herein, was adjudged to be guilty and sentenced to be imprisoned for a period of 10 years, and to pay a fine of $10,000. upon the above-mentioned federal indictment for violation of 18 U. S. C. § 1951.

Dissenting Opinion of Justice Cohen

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

Nos. 219 and 225 March Term, 1964

W. C. HURTT, Trustee in Bankruptcy of the Estate of William G. Rider, Individually and trading as RIDER SUPPLY COMPANY and as RIDER CONSTRUCTION COMPANY, Bankrupt,

v.

NICHOLAS A. STIRONE,

Appellant.

SAME,

Appellant,

v.

SAME.

Appeals from the Judgment of the Court of Common Pleas for the County of Allegheny at No. 3290 October Term, 1957.

Filed January 14, 1965.

COHEN, J.

As recently as *Zubrod v. Kuhn*, 357 Pa. 200, 53 A. 2d 604 (1947) we held that the record of a defendant's conviction of criminal assault and battery was *inadmissible* in an action to recover civil damages for the same assault and battery. Today the majority holds that a conviction of a defendant in a *federal criminal court* for a violation of the *federal anti-racketeering law*, including extortion, as

federally defined, is *conclusive proof* of plaintiff's right to recover from the defendant in a *state unjust enrichment action.*

The majority relies on *Pennsylvania Turnpike Comm. v. United States Fidelity & Guaranty Co.*, 412 Pa. 222, 194 A. 2d 423 (1943). First, we there established, at great length, that the conduct for which the public official had been criminally convicted was precisely the same conduct which, by contract, made his bondsman civilly liable to the Commonwealth. In fact, we were of the opinion that the criminal conviction itself was tantamount to a breach of the bond. Here we are left to speculate on the correlation of the precise facts supporting the federal offense and the precise facts necessary to prove the plaintiff's alleged civil action. Second, in *Pennsylvania Turnpike* we found that the identical questions involved in the civil cases had been "exhaustively and conclusively litigated" in the criminal case and that the questions were thoroughly explored in a long and well conducted trial when "detailed evidence was adduced." Here, the majority merely states that defendant had "more than ample opportunity to overcome the charges lodged" and then asserts that it is "incredible to such a situation that defendant would present less than his best defense, knowing that his failure would result in loss of substantial property, or even his liability."

Third, in *Pennsylvania Turnpike*, before we allowed the criminal conviction to be *conclusive proof* of the facts therein established—which is another way of saying that the doctrine of collateral estoppel applied—we found that there was a substantial identity of parties. This, of course, is a prerequisite to collateral estoppel. *Helmig v. Rockwell Manufacturing Company*, 389 Pa. 21, 131 A. 2d 622 (1957). The Commonwealth was the plaintiff-prosecutor in the

criminal case and the Turnpike Commission was the plaintiff in the civil case. We said "[t]he commission is an instrumentality of the Commonwealth." *Pennsylvania Turnpike, supra,* at 220. While Torrance was the defendant in the criminal case and his surety the defendant in the civil case, we held that "[t]he surety is bound by the determination of the principals liability." *Id.,* at 229. But by no stretch of the imagination can the plaintiff in this civil case be likened unto the federal government for purposes of the identity of parties rule in the application of collateral estoppel. Therefore, the criminal conviction cannot be conclusive proof of plaintiff's right to recover in this case.

Finally, the majority would distinguish records of conviction in "minor matters" only on the supposition that "expediency and convenience, rather than guilt, often control defendant's trial technique" and that "in such cases, it is not obvious that the defendant has taken advantage of his day in court, and it would be unreasonable and unrealistic to say he waived that right as to a matter (civil liability) which was probably not within contemplation at the time of the conviction." I doubt the propriety of this conjectured distinction as much as I do the application of collateral estoppel doctrine on the conjecture that it is unbelievable that defendant will not try in a "serious" criminal case. Also, I doubt that the distinction between "major" and "minor" matters can be well drawn by courts in this area of vital importance to the litigants.

For these reasons I dissent.

Dissenting Opinion of Justice Musmanno

IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

Nos. 219 and 225 March Term, 1964

W. C. HURTT, Trustee in Bankruptcy of the Estate of William G. Rider, Individually and trading as RIDER SUPLY COMPANY and as RIDER CONSTRUCTION COMPANY, Bankrupt,

v.

NICHOLAS A. STIRONE,

Appellant,

SAME,

Appellant,

v.

SAME.

Appeals from the Judgment of the Court of Common Pleas for the County of Allegheny at No. 3290 October Term, 1957.

No. 219: Entered, April 20, 1964.
No. 225: Entered, April 28, 1964.

DISSENTING OPINION

MUSMANNO, J. Filed: January 14, 1965.

What a defendant battles for in a criminal case is wholly different from what he defends against in a civil case. The

issues are different, the facts frequently differ, and they are certainly presented in a different way. Obviously, the objectives are different.

In fighting for his name and liberty in a criminal prosecution, the defendant might well be unconcerned about details of financial bookkeeping, his eye being focused on the main objective of clearing his name. What is money against honor and liberty? In a civil case, however, a defendant can battle for every dime and penny unhaunted and uninhibited by the shadow of a criminal conviction which could blast his whole life. Thus, it is entirely unfair and improper to introduce during a civil trial the judgment of a criminal court as being conclusive of the issues raised in the civil court.

The Majority Opinion admits that:

> "In Pennsylvania, judgments in criminal cases for years were held inadmissible to establish the facts in a civil case."

but gives no reason for changing that fundamental rule of justice. It merely states that "the tendency of recent decisions is away from" such a rule. That to me is not enough to justify so drastic a change in the law which touches upon a man's liberties.

I do not share the apprehension voiced in the Majority Opinion that to contest the issue of money in a civil case after a criminal conviction "would be to fly in the face of reason," and it "would be a general indictment of the whole American jury system." This presupposes that a jury may never err and that a jury's verdict is like a precious vase which must not be handled for fear of breakage. In every session of this court the vase of verdicts is studied and often sent back to the factory for refusing.

The Majority states that where the lesser misdemeanors are involved, the record of the conviction may not be introduced in a civil suit involving the same subject matter. If the conviction may not be introduced where the offense is a lessor one, why should it be introduced where the offense is grave and calls for severe penalties and, in the event of an adverse civil verdict the judgment will also be a severe one?

I dissent.

Letter Dated February 19, 1965 from Prothonotary

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PATRICK N. BOLSINGER
Prothonotary

HELEN D. STEELE
Deputy Prothonotary

PITTSBURGH, PA.

February 19, 1965

Lloyd F. Engle, Jr., Esq.
Wilner, Wilner and Kuhn, Esqs.
1314 Frick Building
Pittsburgh 19, Pa.

Re: W. C. Hurtt, etc. v. Stirone
No. 219 March Term, 1964

Dear Mr. Engle:

Please be advised that the Court has entered the following Order on the Petition for Reargument filed in the above matter:

"February 16, 1965

Denied, *Per Curiam,* By the Court"

Very truly yours,

HELEN D. STEELE
Deputy Prothonotary

HS/wb
cc: David McNeil Olds, Esq.

APPENDIX B

Constitution of United States Amendment VII Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Constitution of United States Amendment XIV, Section 1 Due Process and Equal Protection

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Pennsylvania Article 1, Section 6
Trial by Jury

Trial by jury shall be as heretofore, and the right thereof remain inviolate.

Certificate of Service

I certify that I have served the foregoing Petition upon opposing counsel, David McNeil Olds, Esquire, by mailing same to him postpaid at his office address, 747 Union Trust Building, Pittsburgh, Pennsylvania 15219.

LLOYD F. ENGLE, JR.,
Attorney for Petitioner.

Office Supreme Court, U.S.
FILED
MAY 11 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 1065

NICHOLAS A. STIRONE,

Petitioner,

vs.

W. C. HURTT, Trustee in Bankruptcy of the Estate of William G. Rider, Individually and trading as Rider Supply Company and as Rider Construction Company, Bankrupt,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1964

No. 1065

NICHOLAS A. STIRONE,

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vs.

W. C. HURTT, Trustee in Bankruptcy of the Estate of William G. Rider, Individually and trading as Rider Supply Company and as Rider Construction Company, Bankrupt,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of the Case

Respondent, as trustee in bankruptcy of one William G. Rider ("Rider"), sued petitioner Nicholas A. Stirone ("Stirone"), a labor leader, to recover back $31,274.13 extorted by petitioner from the bankrupt. Stirone was convicted of this very act of extortion twice in jury trials under the Hobbs Anti-Racketeering Act, 18 U. S. C. § 1951. *United States v. Stirone,* 168 F. Supp. 490 (W. D. Pa. 1957), *aff'd* 262 F. 2d 571 (3rd Cir. 1958), *rev'd* [on error in the trial judge's charge on what constituted interstate

commerce], 361 U. S. 212 (1960); and *United States v. Stirone*, 311 F. 2d 277 (3rd Cir. 1962), *cert. den.* 372 U. S. 935 (1963).

The bankrupt, in whose behalf respondent brought this civil action, was the principal government witness in the criminal proceedings. Rider testified in those proceedings, as he did here, that Stirone, a very powerful labor leader in the Western area of Pennsylvania, threatened him with the loss of a contract to supply ready-mixed concrete unless he paid $.50 per cubic yard extortion. Rider testified that he did so because he was aware of Stirone's power as a labor leader and knew that Stirone could enforce his threat by causing labor difficulty. *United States v. Stirone*, 168 F. Supp. 490 at 497, 311 F. 2d 277 at 279. At the time of the threat, and during the period of time the extortion moneys were paid, Stirone was the president of two labor councils which negotiated for the principal labor unions in 33 counties of Western Pennsylvania with the principal heavy construction and large building contractors, including particularly Ragnar Benson, Inc., the company to which Rider was to supply concrete under his contract (Certified Record, pp. 19a-20a).

The defense in this civil action was the same as that offered in both criminal trials, that the petitioner was an influence peddler rather than an extortioner. Stirone claimed that he had been paid the $31,274.13 by the bankrupt as a "commission" for the use by him of his influence in helping the bankrupt obtain a contract with Ragnar Benson, Inc. *United States v. Stirone*, 168 F. Supp. 490 at 495; 311 F. 2d 277 at 279. There was no dispute that Stirone had received the $31,274.13. In fact, in this civil action he pleaded a counterclaim alleging that the bankrupt still owed him $1,503.75 under the claimed "commission" agreement (Certified Record, pp. 12a-14a).

The certified record of petitioner's indictment and conviction of extortion of the $31,274.13 from the bankrupt of the trustee-plaintiff in *United States of America v. Nicholas A. Stirone*, Criminal No. 14871, United States District Court for the Western District of Pennsylvania, was accepted by the trial court as conclusive proof of the fact of extortion. On this basis the trial court directed the verdict for respondent (Certified Record, pp. 257a-260a).

The court *en banc* affirmed the direction of the verdict for respondent and petitioner appealed to the Supreme Court of Pennsylvania (Appeal at No. 219 March Term, 1964). The Supreme Court, after argument, affirmed, 416 Pa. 493, 206 A. 2d 624 (1965). Petitioner then filed a Petition for Reargument (Certified Record, pp. 303-306) which was refused. This Petition followed.

ARGUMENT

I. The federal constitutional questions were not raised seasonably.

A federal constitutional question raised for the first time in a Petition for Reargument before the highest state appellate court is untimely.

American Surety Company v. Baldwin, 287 U. S. 156 (1932);

Radio Station WOW, Inc. v. Johnson, 326 U. S. 120, 128 (1945).

In the *American Surety Company* case this Court dismissed a Petition for Certiorari premised on a constitutional ground raised for the first time in a Petition for Reargument in a state court and said through Mr. Justice Brandeis at 287 U. S. 163-164,

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court."

The Petition for Certiorari here, pages 6 and 7, clearly demonstrates that the constitutional questions (the applicability of Seventh and Fourteenth Amendments to the Constitution of the United States) were not raised until petitioner's Petition for Reargument in the Supreme Court of Pennsylvania (Certified Record, pp. 303-306). True, the question of the admissibility of the indictment and record of conviction were raised as stated on page 6 of the Petition for Certiorari but a reading of the Certified Record at the pages set out by petitioner, or any other pages thereof, clearly demonstrate that no constitutional questions were raised at the trial or in the Motion for New Trial. The Statement of Questions Involved in petitioner's Appeal Brief filed with the Supreme Court of Pennsylvania at No. 219 March Term, 1964 makes no reference to any federal or state constitutional questions. There is no mention in the brief otherwise of any constitutional issues, and the only reference to the state or federal constitutions is a passing one at page 16 where the following appears,

> "This [referring to the quantity of evidence offered in a criminal trial], of course, stems from the aforesaid basic and well established rights, many of which are provided by the Constitutions of the United States and the Commonwealth of Pennsylvania."

Therefore, petitioner is fairly bound by the rule that certiorari will be denied where it is premised on a constitutional ground raised for the first time in a Petition for Reargument before the highest state appellate court.

Further, this Court has held that it is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with state law.

Edelman v. California, 344 U. S. 357 (1953);
Pennsylvania Railroad Co. v. Illinois Brick Co., 297 U. S. 447 (1936).

The federal constitutional questions were not seasonably raised under Pennsylvania law. *In Re Dorrance's Estate*, 172 Atl. 900 (1933) [Not reported in official state reports]. In this case the Pennsylvania Supreme Court refused to grant a Petition for Reargument because the federal question of due process under the Fourteenth Amendment was raised for the first time in the Petition.

Rule 59 of the Rules of the Supreme Court of Pennsylvania, "Statement of Questions Involved", reads as follows:

> "The statement of the questions involved must set forth each question separately, in the briefest and most general terms, without names, dates, amounts or particulars of any kind, and whenever possible, each question must be followed immediately by an answer stating simply whether it was affirmed, negatived, qualified or not answered by the court below. If a qualified answer was given to the question, appellant shall indicate, most briefly, the nature of the qualification; or if the question was not answered and the record shows the reason for such failure, the reason shall be stated briefly in each instance without quoting the court below. The questions and answers in their entirety should not ordinarily exceed twenty lines, must never exceed one page, and must always be printed in type at least as large as point 11, on the first page of the Brief, without any other matter appearing thereon. *This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not thus set forth in or*

necessarily suggested by the statement of questions involved." (Emphasis added.)

Petitioner's Statement of Questions Involved in his brief before the Supreme Court of Pennsylvania does not raise the constitutional questions which are here raised and were raised for the first time in his Petition for Reargument in the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania has consistently held it will not consider arguments on questions not presented in the Statement of Questions Involved, and it did not consider any in this case, as is apparent from the opinions filed (Petition for Writ of Certiorari, pp. 16-28).

Kuhns v. Brugger, 390 Pa. 331, 354, 135 A. 2d 395, 408 (1957);

Kerr v. O'Donovan, 389 Pa. 614, 134 A. 2d 213 (1957).

The Supreme Court of Pennsylvania also holds that a question not raised properly in the court below will not be considered by it on appeal even though the question sought to be raised involves a constitutional issue, a doctrine which applies in the instant case.

Wynnewood Civic Association v. Lower Merion Township Board of Adjustment, 406 Pa. 413, 179 A. 2d 649 (1962);

Rome Township Referendum Recount Case, 397 Pa. 331, 155 A. 2d 361 (1959).

Petitioner did not raise the *constitutional questions* in the argument of this case before the Supreme Court of Pennsylvania, nor did he raise the *constitutional questions* in the trial court or in his Motion for New Trial (See: Petition for Certiorari, pp. 6-7, and references there to the Certified Record). Therefore, this Court is without the power to decide the constitutional questions because they were not seasonably raised in accordance with state law.

II. The decision in this case was based on an adequate non-federal ground.

It is hornbook law that the Supreme Court of the United States will not exercise jurisdiction for review of a federal constitutional question where the decision of the state court was based on an adequate non-federal ground. The decision of the Pennsylvania Supreme Court in this case is an application of a principle which is part of the law of *res judicata*. This Court has refused to exercise its jurisdiction where the law of *res judicata* constituted an adequate non-federal ground for the state decision.

Haley v. Breeze, 144 U. S. 130 (1892);
The Northern Pacific Railroad Company v. Ellis, 144 U. S. 458 (1892);
Postal Telegraph-Cable Company v. City of Newport, 247 U. S. 464 (1918).

III. The Seventh Amendment does not apply to civil jury trials in state courts.

The contention as to denial of a federal right to trial by jury by directing a verdict is unsound on its face. This Court has held that the Seventh Amendment does not apply to proceedings in state courts. *Minneapolis & St. Louis Railroad Company v. Bombolis*, 241 U. S. 211 (1916). Petitioner does not refer the Court to any case in which the Seventh Amendment has been construed as inhibiting the right of a state court judge to direct a verdict in a state civil action.

Indeed, this Court has held that the Seventh Amendment to the Constitution of the United States does not prevent a federal trial judge from directing a verdict. *Galloway v. United States*, 319 U. S. 372, 388-396 (1943). Further, the Pennsylvania Superior Court has held that Section 6

of Article I of the Constitution of the Commonwealth of Pennsylvania does not prohibit a trial judge from directing a verdict. *American Warming & Ventilating Company v. Fayette Lumber Company, Ltd.*, 57 Pa. Super. 608 (1914).

The Supreme Court of Pennsylvania heard the same arguments as are here presented by petitioner on the merits of the question whether the verdict should have been directed and was not persuaded. Petitioner may not ask this Court to re-examine those merits, except as they involve a "federal right"—and there is no federal right to a trial by jury in a state civil action.

IV. There was no denial of due process of law under the particular circumstances in treating the conviction of extortion as conclusive evidence of the fact of extortion.

In this lawsuit a convicted extortioner was sued by his victim's trustee in bankruptcy to recover the extorted money. At trial the record of conviction of this particular act of extortion was accepted by the trial judge as conclusive evidence of the fact of the extortion. Since there was no effort made to attack the conviction on the ground it had been obtained by fraud, perjury or was otherwise not legally proper, and since the receipt of the extorted sum was admitted, the trial judge directed a verdict for the plaintiff. The Supreme Court of Pennsylvania affirmed the trial judge's action.

Two contentions are advanced:

(1) that to permit this criminal to be bound by the conviction of extortion when his victim sues would somehow abridge his rights in the *criminal case* and (2) that because his conviction was theoretically subject to being upset by reason of *habeas corpus* proceedings, the conviction did not have a finality justifying its use.

The first contention is irrelevant, and upon analysis so speculative as to deserve rejection for that reason alone. Since the challenged ruling by the trial judge in this civil action did not take place until several years after the defendant had completed his defense in the second of two trials of the criminal proceeding under the Hobbs Act, that ruling obviously did not inhibit his actions in the criminal trial. Even if it had, the forum of complaint would be in the criminal proceedings where the "abridgement" of rights would in the theory of the petitioner take place. It is certainly no infirmity in the civil proceeding that a consequence of it *might* be to affect the defensive maneuvers in a criminal proceeding, where the criminal proceeding was already completed.

Furthermore, it is artful speculation to suggest that the criminal judgment was obtained because of a poor defense. This theory would justify equally rejection of the principle of *res judicata* because of the speculative possibility that the first decision might have been differently decided if one or both of the parties presented a different case—or the judge were different, or the jurors, or the weather. In the particular case of petitioner Stirone, he was represented at both criminal trials by the same lawyer who represented him in the trial of the civil action and his second conviction was affirmed by the Court of Appeals for the Third Circuit and certiorari was denied by this Court. The record in that criminal case contained testimony by the same witnesses as were called in the instant case, to the same effect.

The second contention is hardly more than a query—was the conviction improperly used because of the possibility that it might be upset in *habeas corpus* proceedings. Again the parallel with the doctrine of *res judicata* is pertinent.

A determination which has been affirmed by the highest court having jurisdiction over the matter under the applicable statutory or judicial authority in accordance with the pertinent procedural provisions thereof is final, even though thereafter efforts are made to obtain re-examination of the determination. *Helmig v. Rockwell Manufacturing Company*, 414 Pa. 518, 201 A. 2d 205 (1964). Until the efforts are successful the final adjudication stands, and its finality is not affected by the theoretical possibility that it may be set aside. So in the context before the trial court, the conviction of extortion by the petitioner of $31,248 from the bankrupt had been finally adjudicated. The theoretical possibility of the vacation of this adjudication neither entitled the petitioner to avoid going to jail for his crime, nor to avoid repayment of the extorted money.

The due process clause of the Fourteenth Amendment does not provide the right to re-litigate questions which have already been decided in a previous proceeding involving the same factual issues. *Baldwin v. Iowa State Traveling Men's Association*, 283 U. S. 522 (1931). In the instant case the decisive factual question in both the criminal and civil proceedings was the manner in which Stirone obtained the money. It is clear that all the Fourteenth Amendment demands is that full opportunity be presented in the previous proceeding to litigate the questions present in the subsequent action. *Sherrer v. Sherrer*, 334 U. S. 343 (1947).

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

CARL E. GLOCK,
DAVID McNEIL OLDS,
BLAIR S. McMILLIN,
REED, SMITH, SHAW & McCLAY,
Attorneys for Respondent.

Certificate of Service

I certify that I have served this Brief upon opposing counsel, Lloyd F. Engle, Jr., Esquire, by mailing same to him postpaid at his office address, 1312 Frick Building, Pittsburgh, Pennsylvania 15219.

CARL E. GLOCK,
Attorney for Respondent.